No. 89-1687

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondents have failed to respond to, let alone rebut, the principal arguments in COMSAT's petition for a writ of certiorari. Specifically, the Acting Solicitor General has made no effort to answer COMSAT's showing that this case raises important issues, cutting across agency lines, which the D.C. Circuit has been unable to resolve. And even with respect to the merits, the Acting Solicitor General has elected not to answer COMSAT's central con-

tention that the FCC's rate-of-return/refund scheme does violence to the express ratemaking provisions of the Communications Act and the numerous decisions of this Court and the courts of appeals that have barred retroactive ratemaking.

1. Virtually all of Respondents' brief in opposition is an attempt to bolster one side of an issue that has deeply divided the D.C. Circuit; the only reference to the importance of having the Court resolve the issue is relegated to a single footnote.[1] The significance of this case cannot be so lightly dismissed.

COMSAT stressed in its petition that the question of whether an agency can replace the prospective ratemaking provisions crafted by Congress with an agency-created retroactive ratemaking scheme is of crucial and continuing importance to telecommunications common carriers.[2] The amicus brief filed by the Bell Operating Companies and the United States Telephone Association fully supports that position.[3]

The Acting Solicitor General's sole response is that any challenge to the FCC's ratemaking scheme was put to rest by this Court's denial of certiorari in the *New England* case[4] and that the unpublished order at issue here is of no precedential value.[5] In fact, this Court routinely reviews unpublished decisions that—like the pres-

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[1] Brief for Federal Respondents in Opposition ("Br. in Opp.") at 11 n.14.

[2] Petition for a Writ of Certiorari ("Petition") at 8-10.

[3] Brief of Local Telephone Companies as *Amicus Curiae* in Support of Petitioner ("Amicus Br.") at 6-8.

[4] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied sub nom. Southern Bell Tel. & Tel. Co. v. FCC*, 109 S. Ct. 1942 (1989).

[5] Br. in Opp. at 11.

ent one—relied on previous published opinions;[6] and denial of certiorari—in *New England* as in any case—is accorded no significance.[7] Moreover, when Respondents opposed certiorari in *New England*, they argued that the continuing significance of the use of refunds to enforce rate of return prescriptions was uncertain in view of the possibility of the Commission's adopting "price caps," and further that there might well be a better vehicle for reviewing the FCC's rate-of-return scheme.[8] As amici demonstrate, the adoption of price caps would not obviate the need to resolve this question, and the *COMSAT* case presents the central legal issue in a clear-cut manner.[9]

Furthermore, the importance of the issue is not limited to the field of telecommunications. Rather, as Judges Starr, Williams, and Buckley have recognized, the question presented in this case "cut[s] across agency lines," and has the potential to adversely affect service providers subject to regulation under the Interstate Commerce Act, the Federal Power Act, and the Natural Gas Act.[10] The D.C. Circuit has repeatedly held that under the parallel provisions of these other statutes the agency cannot use its ancillary authority to replace the congressionally enacted ratemaking provisions with an agency-created system of retroactive ratemaking.[11] In recent months, panels of the

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[6] *See, e.g., Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (1990); *Hardin v. Straub*, 109 S. Ct. 1998 (1989); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

[7] *Shaw v. Delta Air Lines*, 463 U.S. 85, 94 n.11 (1983).

[8] Brief for Federal Respondents in Opposition at 28-29, *Southern Bell Tel. & Tel. Co. v. FCC*, No. 88-1249 (1989).

[9] Amicus Br. at 4-6.

[10] *New England Tel. & Tel. Co. v. FCC*, No. 85-1087, Order Denying Rehearing *En Banc* at 2 (D.C. Cir. Nov. 2, 1988) (Starr, Williams & Buckley, JJ., dissenting).

[11] *See, e.g., Public Utils. Comm'n v. FERC*, 894 F.2d 1372, 1383-84 (D.C. Cir. 1990); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *American Public Gas Ass'n v. Federal Power*

D.C. Circuit have reasserted this position in two cases involving the Federal Energy Regulatory Commission.[12] This line of cases cannot be reconciled with the result reached by the *New England* and *COMSAT* panels. The brief in opposition makes no mention of the FERC cases, including the two most recent ones, even though we understand that the Acting Solicitor General is currently considering whether to seek certiorari in them.[13]

Because of repeated, multiple recusals, the D.C. Circuit —which hears the vast majority of federal ratemaking cases—has been unable to grant this matter "the *en banc* treatment that it so plainly deserves." [14] Consequently, only this Court can resolve the current disarray. We urge it to do so now.

2. Respondents are also singularly unresponsive on the merits of Petitioner's contentions. COMSAT's basic argument is that the FCC decision, sustained by the court below, imposes a retroactive ratemaking regime that does serious violence to the Communications Act and the decisions of this Court and the courts of appeals. Respondents do not face the fact that the "binding rate of return prescription" concept they defend is in reality a device for retroactively invalidating, upon the basis of later events, rates that were valid when filed. More fundamentally, Respondents never come to grips with the sig-

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Comm'n, 567 F.2d 1016, 1057 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

[12] *See Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-97 (D.C. Cir. 1990); *Associated Gas Distributors v. FERC*, 893 F.2d 349, 355-56 (1989), *rehearing en banc denied*, 898 F.2d 809 (D.C. Cir. 1990).

[13] That the Acting Solicitor General may believe that the result in this case is correct and the result in the FERC cases is incorrect hardly supports a denial of certiorari here to resolve that conflict.

[14] *New England*, Order Denying Rehearing *En Banc* at 2 (Starr, Williams & Buckley, JJ., dissenting).

nificant difference between prescriptions of charges or *rates*, which the statute specifically permits,[15] and prescription of *rates of return*.[16] The difference is critical.

When a dollar rate is prescribed, the carrier and its customers know what must be charged and paid, and, whether it is later deemed too high or too low by some standard, it may not be retroactively second-guessed. In contrast, when an allowable rate of return is prescribed, rates designed to achieve that return and duly accepted by the Commission may (and usually will) result in a lesser or greater return. As the Respondents concede, not until revenues are actually collected can it be determined"

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[15] Section 205(a) of the Communications Act provides that "Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable *charge* or the maximum or minimum, or maximum and minimum, *charge* or *charges*, to be thereafter observed . . . ." Once the Commission has done so, the carrier may "not thereafter publish, demand, or collect any *charge* other than the *charge* so prescribed." 47 U.S.C. § 205(a) (emphasis added).

[16] Respondents' reliance on *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), Br. in Opp. at 12-13, is wholly misplaced. In *Nader*, the court used the term "prescription" with respect to rate of return, but in doing so it was simply establishing one of the factors (along with rate base, expenses, and estimated demand) to be used in the setting of rates, *see* Petition at 14, and not establishing a ceiling that would assume a life of its own that could be "enforced" years later in light of subsequent events. In other words, in *Nader* the rate of return "prescription" was incidental to a power the Commission unquestionably has—the power to establish just and reasonable rates prospectively; it is only through distortion of *Nader* that such a prescription has been converted into a vehicle for the Commission's exercising a power it unquestionably does not have—the power to order refunds of rates collected under tariffs lawfully on file.

whether the target rate of return has been met or exceeded.[17]

Under the statutory scheme, once a carrier's rates are lawfully on file, those are the only rates that the carrier may lawfully charge until new rates are established to be prospectively observed. In contrast, under the Commission's scheme, if the carrier's actual rate of return exceeds the prescribed rate of return, the rates on file are retroactively rendered illegal.[18] Such illegality occurs, however, if, and only if, the carrier's return was "excessive"; in such a case, refunds will be ordered. But if the return was "deficient," the carrier must absorb the loss; it cannot collect more from its customers. Two consequences of this approach are obvious: First, this is a classic example of retroactive ratemaking; to characterize it as an "obligation that . . . was set prospectively" [19] borders on the disingenuous. Second, it is fundamentally unfair to the carrier to impose a scheme that requires refunds when the rate of return "prescription" is exceeded, but no increased charges when the actual rate of return falls below the "prescribed" level.

The attempted after-the-fact ratemaking in this case has no more validity than the closely parallel attempt struck down in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932). In that case, the Interstate Commerce Commission prescribed a carrier's rates, the carrier filed rates in conformity with the prescription, the ICC permitted the rates to go into effect, and the carrier charged the filed rates. The agency subsequently determined that the carrier's rates had generated an excessive return and sought to compel the carrier to make refunds of revenues collected *after* the pre-

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[17] Br. in Opp. at 14.

[18] Br. in Opp. at 17.

[19] Br. in Opp. at 16.

scription.[20] This Court refused to let the ICC retroactively impose refunds on a carrier that had charged rates lawfully in effect by action of the agency.[21]

Perhaps recognizing the weakness of the FCC's case under the specific provisions of the statute, Respondents rely on the general language of Section 4(i), which empowers the FCC to issue regulations "not inconsistent" with the Communications Act.[22] But under the substantive provisions of the Act, the Commission may order refunds only if it follows specified procedures (providing important safeguards) which, as Respondents concede, were not followed in the present case.[23] To rely on the general grant of authority in Section 4(i) in the face of these detailed statutory procedures disregards the principle that "[s]pecific terms prevail over the general." *D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 207-8

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[20] Respondents, Br. in Opp. at 16 n.20, apparently misread the case on this point. *See Arizona Grocery*, 284 U.S. 381-82 (ICC prescribed rates in 1921 and subsequently sought to order a carrier to refund revenues collected between 1922 and 1925 pursuant to that prescription.).

[21] *Arizona Grocery*, 284 U.S. at 390; *see* Petition at 17-18. Dismissing *Arizona Grocery* (which involved a prescription of rates rather than rates of return), the Acting Solicitor General asserts that COMSAT cites no case directly on point. Br. in Opp. at 16 n.20. It is hardly surprising that there is no case (other than *New England*) precisely on point because, although the basic federal ratemaking statutes have remained essentially unchanged for fifty years, neither the FCC nor any other federal ratemaking agency has previously construed a "rate of return prescription" as the FCC has or sought to "enforce" it through refunds.

[22] 47 U.S.C. § 154(i).

[23] *See* FCC Reply to COMSAT Opposition to Summary Affirmance at 9 n.16 (Oct. 11, 1989). The specific refund procedures are set out in Section 204 of the Communications Act, 47 U.S.C. § 204. *See* Petition at 10-12. Contrary to Respondents' suggestion, Br. in Opp. at 15, general refunds of the sort ordered by the Commission in this case are *not* authorized by Sections 206-209 of the Communications Act, 47 U.S.C. §§ 206-209. *See* Petition at 11 n.37.

(1932). As Judge Williams noted in a recent case construing the parallel provision of the Natural Gas Act, such general grants of authority do not "possess some exceptional power to trump" the substantive provisions of the governing statute.[24] Rather, a federal regulatory agency must "adhere to the basic framework of [its governing] Act, despite resulting inconvenience." [25]

Respondents' argument that Section 4(i) permits the Commission to order a refund as a "remedy" for the "violation" of its prescription order [26] is likewise unavailing. In the present case there is no violation to remedy: the Commission ordered COMSAT to file rates reasonably designed to achieve an 11.48% rate of return, and, as the Commission has conceded, during the period at issue in this case COMSAT complied with this order.[27] The asserted violation rests on the assumption that the rates filed by COMSAT may be invalidated in light of subsequent events, which is clearly retroactive ratemaking.

Finally, Respondents' argument that the retroactive ratemaking defended here "vindicated" the "statutory balance of interests" [28] is wholly without substance. First,

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[24] *Public Service Comm'n v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989).

[25] *Id.* at 492.

[26] Br. in Opp. at 14-16.

[27] *See Communications Satellite Corp.*, CC Docket No. 80-634, Memorandum Opinion & Order, Mimeo No. 5797, at ¶ 13 (Common Carrier Bur., released Aug. 2, 1984).

Respondents imply that COMSAT did not initially comply with the 1978 prescription. Br. in Opp. at 6. In fact, in 1978 COMSAT filed tariffs fully implementing the settlement agreement. It was only in the face of the extraordinary inflation that followed that COMSAT filed new tariffs which, while reducing its rates, were targetted (with full disclosure to the Commission) to a higher rate of return.

[28] Br. in Opp. at 18.

an agency may not rewrite its statute to tilt the balance in favor of one group at the expense of another group. Second, in any event, the statute as written fully protects both sets of interests. At the time a carrier files its rates, the Commission has the opportunity—indeed, the obligation—to scrutinize the carrier's rates, and the carrier has the burden of justifying its proposed rates.[29] If the Commission believes that the rates filed by the carrier may not be just and reasonable, it may suspend those rates and, after investigation, reject them. In addition, once a tariff has gone into effect, the Commission —on its own motion or pursuant to a complaint—has full power to investigate a carrier's effective rates and, if it concludes that they are not just and reasonable, to prescribe new rates "to be thereafter observed."[30] The one thing that the Commission may not do is to go back and order a carrier to refund money collected pursuant to its lawfully effective rates. That, however, is precisely what the Commission has done here.

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[29] 47 U.S.C. § 204(a).

[30] *Id.* at § 205(a).

CONCLUSION

As the dissenting opinions in the D.C. Circuit make clear, the issue presented in this case "is of manifest importance" and "[t]he errors complained of are, in short, profound."[31] For the foregoing reasons, and for those set forth in the petition for certiorari, the petition should be granted.

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[31] *New England*, Order Denying Rehearing *En Banc* at 2 (Starr, Williams, & Buckley, JJ., dissenting).